

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID LAWRENCE JOHNSTON,
Petitioner,
vs.
CARROL PORTER,
Respondent.

NO. CV-05-78-CI

ORDER STRIKING REPORT AND
RECOMMENDATION, DIRECTING SERVICE
AND DIRECTING EXPEDITED RESPONSE
REGARDING PETITIONER'S RELEASE
STATUS

--- ACTION REQUIRED ---

BEFORE THE COURT is Petitioner's Objection (Ct. Rec. 9) to the Report and Recommendation to dismiss his petition. Petitioner asserts, contrary to the Report and Recommendation, his sentence for a First Degree Robbery conviction expired on April 18, 2005, and a grant of federal habeas relief would result in his immediate release from custody. Based on these assertions, and Petitioner's status as a *pro se* litigant, **IT IS ORDERED** the Report and Recommendation (Ct. Rec. 8) is **STRICKEN**. The petition shall proceed under 28 U.S.C. § 2241.

Mr. Johnston seeks to preclude his re-trial on charges of Second Degree Felony Murder and Second Degree Attempted Murder. The Washington State Court of Appeals, Division III, vacated his conviction for second degree felony murder on February 3, 2005. He asserts a re-trial would violate double jeopardy.

1 Liberally construing the petition and objections in the light
2 most favorable to Petitioner, the court finds an answer from
3 Respondent is appropriate. Accordingly, **IT IS ORDERED:**

4 1. Pursuant to Rule 4, Rules Governing Section 2254 Cases in the
5 United States District Courts, the United States Marshal shall serve
6 by certified mail a copy of the petition (Ct. Rec. 1), all documents
7 supporting the petition, Petitioner's Objection (Ct. Rec. 9) and this
8 Order on Respondent and the Office of the Attorney General for the
9 State of Washington, Criminal Justice Division. The District Court
10 Executive shall send a copy of this Order to the Petitioner.

11 2. Within **TEN (10) BUSINESS DAYS** of receipt of this Order,
12 Respondent **SHALL** notify the court of Petitioner's release date (based
13 on the 1998 robbery convictions) and Petitioner's present release
14 status.

15 3. Respondent shall file and serve an answer within **FORTY-FIVE**
16 **(45) days** of receipt of a copy of this Order. See Rule 5, Rules
17 Governing Section 2254 Cases in the United States District Courts.
18 Respondent should state in the answer whether Petitioner has exhausted
19 available state remedies, whether an evidentiary hearing is necessary,
20 whether there is any issue of abuse or delay under Rule 9, Rules
21 Governing Section 2254 Cases in the United States District Courts, and
22 discuss the availability of transcripts. Respondent shall attach to
23 the answer portions of the transcripts deemed relevant. IF RESPONDENT
24 CHOOSES TO PROCEED BY MOTION TO DISMISS RATHER THAN ANSWER, THE MOTION
25 SHALL BE STYLED AS ONE UNDER RULE 8, RULES GOVERNING SECTION 2254
26 CASES IN THE UNITED STATES DISTRICT COURT.

4. The District Court Executive shall set a case management deadline sixty (60) days after the date of this Order.

5. Petitioner shall serve upon the Respondent or, if appearance has been made by counsel, upon his attorney, a copy of every further pleading or other document submitted for consideration by the Court. He shall include, with the original paper to be filed with the District Court Executive, a certificate stating the date a true and correct copy of any document was mailed to the Respondent or his counsel. Any paper received by a District Court Judge or Magistrate Judge which has not been filed with the District Court Executive or noted for hearing or which fails to include a certificate of service will be disregarded by the court. Petitioner is also advised that throughout this action, he must notify the District Court Executive regarding any change of address and phone number (at least a message phone). Failure to do so might result in the dismissal of the action if the court is unable to contact Petitioner.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward a copy to Petitioner. Respondent shall file the preliminary notification regarding Mr. Johnston's release date and release status within **ten (10) business days** of receipt of this Order.

DATED this 26 day of May 2005.

s/Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE